

Oklahoma Zoological Trust and International Brotherhood of Teamsters, Local Union 886, AFL-CIO, Petitioner. Case 17-RC-11446

November 8, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 21, 1997, the Petitioner, International Brotherhood of Teamsters, Local Union 886, AFL-CIO, filed a petition seeking to represent employees of the Oklahoma City Zoo. The Regional Director for Region 17 dismissed the petition on the grounds that the Employer, the Oklahoma Zoological Trust (the Employer or Trust), is a political subdivision exempt from Board jurisdiction under Section 2(2) of the Act.¹ The Petitioner filed a timely request for review, and the city of Oklahoma City filed a letter in opposition to the Petitioner's request for review.

The National Labor Relations Board has considered the Petitioner's request for review of the Regional Director's administrative dismissal and finds that it raises substantial issues with respect to whether the Employer is exempt from Board jurisdiction as a political subdivision. Based on the entire administrative record in this case, we affirm the Regional Director's dismissal.

The Employer was created in 1975 through a Trust Agreement between the Society² and city of Oklahoma City in accordance with the Trusts for Furtherance of Public Functions Act, a statute of the State of Oklahoma.³ Under the Trust Agreement, the Society is the trustor and the city is the beneficiary in the event of the termination of the Trust. The Employer was created to develop, maintain, and operate the existing Oklahoma City Zoo, including all land and facilities located on the Zoo's premises, and is empowered to hire and discharge employees, as well as to set employees' compensation and benefits.

Oklahoma statute allows public trusts to draft their trust agreements to provide for the appointment and succession of trustees, subject to certain provisions.⁴ By statute, trustees are required to take the same oath of office as elected public officials.⁵

The Trust Agreement requires that its board of trustees consist of nine members. Three of these nine serve ex officio and include the city manager of Oklahoma

City, the mayor, and the councilperson of the city. The remaining six trustees are selected by the mayor from a slate provided by the Society and are confirmed by the city council. Removal of trustees is regulated by statute, which provides that trustees are subject to removal from office by the district court having jurisdiction.⁶ Removal is "for cause, including incompetency, neglect of duty, or malfeasance in office."⁷ Removal actions may be brought by "a trustee, beneficiary, or any person affected by the administration of the trust estate."⁸

By statute, the Trust is required to file its operating budget with the mayor and city council each year.⁹ The Trust has been authorized by the city council to draw upon the Oklahoma City Zoo tax fund through submission of the specific expenditures for those funds to the city council for approval. In 1990, there was a ballot referendum in which the city electorate voted to levy an additional 1/8-percent sales tax to fund the zoo. The zoo is funded almost entirely from the city's sales tax funds. Oklahoma statute also allows the Trust the power of eminent domain.¹⁰ The Trust is required to hold public meetings and make its records and minutes available for public inspection.¹¹

In order to determine whether entities are political subdivisions exempt from the Act, the Board uses a two-prong test. See *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). Under that test, political subdivisions are entities that are either (1) created directly by the State, so as to constitute departments or administrative arms of the Government, or (2) administered by individuals who are responsible to public officials or to the general electorate. The Supreme Court has stated that state law is not controlling on the question of whether an entity is a political subdivision and that it is to the "actual operations and characteristics" of the entity that the Board must look in deciding whether the entity is exempt from the Act's coverage. *Id.* at 603-604.

The Regional Director found that the Employer satisfies the second prong of *Hawkins* because all trustees are either public officials or selected by public officials and can be removed by a district court. For the reasons stated below, we agree with the Regional Director that the Employer is exempt under the second prong of *Hawkins*.¹²

⁶ 60 OK Stat. Ann. Sec. 178(E).

⁷ *Id.*

⁸ 60 OK Stat. Ann. Sec. 175.23(C).

⁹ 60 OK Stat. Ann. Sec. 176(G).

¹⁰ 60 OK Stat. Ann. Sec. 176(I).

¹¹ 60 OK Stat. Ann. Sec. 178(D).

¹² Member Fox agrees with former Chairman Stephens in his dissenting opinion in *Woodbury County Community Action Agency*, 299 NLRB 554, 555-561 (1990), that satisfaction of the second prong of the *Hawkins* test will not always be sufficient to establish that an entity is exempt from the Board's jurisdiction. Under all the cir-

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¹ An earlier petition filed September 26, 1996, named the Oklahoma City Zoological Society as the Employer. The Regional Director dismissed that petition on October 9, 1996, finding that the Society was a political subdivision. No request for review was filed.

² The Trust Agreement describes the Society as "a non profit charitable privately held corporation."

³ The original Trust Agreement was entered into on January 7, 1975. It was subsequently amended in 1985, 1987, and 1990.

⁴ 60 OK Stat. Ann. Sec. 178(A).

⁵ *Id.*

Here, the Employer was created under Oklahoma statute to take over the operation of the city zoo from the city of Oklahoma City. The trustees are appointed by an elected public official, and they are required by statute to take the same oath of office required of all elected public officials. The operations of the Employer are funded almost exclusively from public funds, and the Employer is accountable to the city council for approval of expenditures of the Oklahoma City Zoo tax fund and to the general electorate for increased funding, such as the ballot referendum in 1990 to increase the sales tax. Further, the Employer's meetings are required to be public, and its records and minutes are available for public inspection. In addition, the Employer by statute has the power of eminent domain. Finally, the trustees are subject to removal by the district court at the instance of any beneficiary or any person affected by the administration of the Trust, which clearly includes public officials and private citizens. Under these circumstances, we agree with the Regional Director that the Employer is an exempt political subdivision because it is administered by individuals who are responsible to public officials and to the general electorate. *Rosenberg Library Assn.*, 269 NLRB 1173 (1984); *Northern Community Mental Health Center*, 241 NLRB 323 (1979).

Contrary to our dissenting colleague, we find that the facts in this case are quite similar to those in *Hawkins*, supra. Here, in addition to the three public officials who serve on the board of trustees, the mayor appoints six trustees from a list submitted by the Society. In *Hawkins*, the commissioners were appointed by an elected county judge from among persons nominated in a petition filed by 38 owners of real property. Also, like the commissioners in *Hawkins*, the trustees are by statute subject to removal for cause by a district court judge in an action initiated by public officials or private citizens.¹³ Further, the statutory provisions governing removal of the trustees are similar to those governing other Oklahoma elected or appointed public officials, who may be removed for cause by a district court in an action initiated by public officials or private citizens.¹⁴ Finally, as in *Hawkins*, the Employer's records are public and open for inspection, the Employer's annual budget is placed in the public domain,

cumstances in this case, however, she finds that the Employer is an exempt political subdivision.

¹³ Our dissenting colleague's requirement that, to render trustees accountable to public officials, the power of removal must be vested exclusively in a single political official or in the general electorate and that removal must be at the will of a public official, rather than vested in the district court based on evidence of incompetency or wrongdoing, is thus, contrary to the Court's decision in *Hawkins*.

¹⁴ 51 OK Stat. Ann. Sec. 92 et seq. Unlike our dissenting colleague, we find no legal significance in the fact that the statutory provisions governing removal of trustees are in separate sections from those governing other public officials. What is legally significant, however, is that those provisions are similar in substance.

and the Employer has the power of eminent domain. Accordingly, we find the Regional Director's finding that the Employer is an exempt political subdivision is in complete accord with the Supreme Court's decision in *Hawkins*, and we affirm his dismissal of the petition.

ORDER

The Regional Director's dismissal of the petition is affirmed and the petition is dismissed.

CHAIRMAN GOULD, dissenting.

I dissent from my colleagues' decision to adopt the Regional Director's finding that the Employer, the Oklahoma Zoological Trust (the Trust), is an exempt political subdivision under the Act. The Regional Director concluded that the Trust is administered by individuals who are responsible to public officials and, therefore, satisfies the second part of the test for determining political subdivisions under *NLRB v. Natural Gas Utility of Hawkins County*, 402 U.S. 600 (1971).¹ Unlike my colleagues, I find that the Trust is not administered by individuals who are clearly responsible to public officials. Accordingly, I would not find that the Trust satisfies the *Hawkins*' test.

In 1975, the Oklahoma Zoological Society, Inc.,² created the Trust under a Oklahoma Statute providing for the creation of "trusts for the furtherance of public functions" for the benefit of the city of Oklahoma City.³ The statute specifically provides that for purposes of Oklahoma law a public trust is a distinct entity from the governmental entity that is its beneficiary.⁴ This provision further provides that the affairs of the public trust shall be separate and independent from the affairs of the beneficiary in all matters and activities authorized by the trust agreement and specifically requires that the public trust's budget, expendi-

¹ Sec. 2(2) of the Act provides that "[t]he term 'employer' . . . shall not include . . . any State or political subdivision thereof . . ." 29 U.S.C. § 152(2). The Act does not define the term "political subdivision" and the legislative history indicates only that Congress meant to exclude the labor relations of Federal, state, and municipal governments from the Board's jurisdiction because governmental employees did not usually enjoy the right to strike. 402 U.S. at 604. In *Hawkins*, the Supreme Court approved the Board's test that an exempt political subdivision is an entity that is either (1) created directly by the state, so as to constitute departments or administrative arms of the government or (2) administered by individuals who are responsible to public officials or to the general electorate. 402 U.S. at 604-605. In the instant case, there is no contention that the Trust is an entity created directly by the State.

² The Society is described in the trust agreement as a privately held nonprofit charitable corporation. There is no contention in the instant case that the Society is an exempt political subdivision and, on this point, I find the trust agreement controlling.

³ 60 Okl. St. Ann. Sec. 176 et seq.

⁴ Sec. 176.1(A).

tures, revenues, and general operation be separate from that of its governmental beneficiary's.⁵

Under the statute creating public trusts, the trust instrument or agreement may provide for the appointment, succession, powers, duties, term, manner of removal, and compensation of the trustees. Trusts created for a municipal beneficiary are further required to have a minimum of three trustees and the trustees may be removed from office for cause, including incompetency, neglect of duty, or malfeasance in office, by a district court having jurisdiction.⁶ The statute further provides that "in all such respects the terms of [the] instrument shall be controlling."⁷ Thus, according to the plain language of the statute creating the Trust, the trust agreement controls the composition of the board of trustees and the means and manner of the selecting additional trustees beyond the required minimum of three. A trust agreement can also impose additional requirements with regard to removal and succession than that required by statute. The trust agreement in this case provides for nine trustees including the mayor, the city manager, and a councilman. The six additional trustees are selected by the mayor, from a list submitted by the Society, and are confirmed by the city Council. They serve 4-year terms.

The Regional Director concluded that the trustees meet the *Hawkins*' test because they are responsible to public officials in the appointment and in their removal. My colleagues agree with the Regional Director, finding this case "quite similar" to the facts of *Hawkins*. I hold a different view of the law and its requirements.

To support a claim of exempt status under *Hawkins*, supra, the entity must demonstrate that its policy-making officials have "direct personal accountability" to public officials or to the general public. *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986) (citing *Truman Medical Center v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981)). In *Hawkins*, the Court concluded that the commissioners of the state utility districts were either appointed by an elected public official or directly elected by the general public and subject to removal under the State's General Ouster law, which provided a procedure for citizens to remove public officials from office. The Court found that these appointment and removal procedures together with the "actual operations and characteristics" of the utility districts, including the district's power of subpoena and eminent domain over public and private property, its authority to issue tax exempt bonds, and its status, declared by statute, as a municipality or public corporation, "betoken a state rather than a private, instrumentality." 402 U.S. at 608. I disagree with my col-

leagues' assertion that the trustees in the instant case have any powers approaching those of the commissioners at issue in *Hawkins*, and as noted above, the Regional Director dismissed the petition solely on the basis of the appointment and removal procedures. In my view, the appointment and removal procedures do not establish the required accountability under *Hawkins*.

The composition of the board of trustees and the appointment procedure is established by the trust agreement not by statute. As to six of the nine trustees, the Society selects the list of candidates. The mayor of Oklahoma City must appoint from the list submitted by the Society. There is no evidence as to how many names are submitted by the Society for each vacancy or even that there is more than one name submitted for each vacancy. At best, the mayor may exercise a limited veto power by choosing one name at the exclusion of the other names on the list.⁸ Thus, those persons whose names are on the list appear to be more accountable to the Society for placing them on the list than to the mayor for appointing them from the list.

Further, to the extent that appointment by the mayor from those names submitted by the Society represents accountability to a public official, the trustees are accountable by choice not by law and such an arrangement does not establish a political subdivision under the second part of the *Hawkins*' test. *Jefferson Community Center v. NLRB*, 732 F.2d 122, 125 fn. 3 (10th Cir. 1984), cert. denied 469 U.S. 1086 (1984). The trustees take all actions by a majority vote. There is no evidence that the votes of those trustees who are mayor, city councilman or city manager have more significance or weight than those of the other trustees. Nothing in the record suggests that these six, a majority of the trustees, have any official connection to any governmental body. Nor are their decisions subject to approval by any such entity.

Further, in my view, a critical factor in establishing accountability under the *Hawkins*' analysis is whether public officials or the general electorate have an unfettered right of removal during an individual's term.⁹ In determining whether the commissioners were responsible to public officials or the general electorate, the *Hawkins*' Court relied on its finding, which it noted was contrary to the Board's finding, that the commissioners were subject to the *same* removal statute as

⁵ Sec. 176.1(D)

⁶ Sec. 178(C) and (E).

⁷ Sec. 178(A).

⁸ *Truman Medical Center*, supra, 641 F.2d at 573. Cf. *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398 (1947) (civilian auxiliaries to wartime military police are employees under the Act despite the military's reservation of the right to veto their hiring and firing).

⁹ I disagree with and would overrule Board precedent to the extent it holds that removal authority by public officials is not a critical factor in determining responsibility to public officials or the general electorate. See *Economic Security Corp.*, 299 NLRB 562 (1990).

other public officials.¹⁰ The courts of appeals have also relied on removal authority as an important factor in the *Hawkins*' analysis.¹¹ As the courts have recognized, the power of removal is as important as the power of appointment to the determination of accountability to public officials or the general electorate. Once appointed, an individual remains accountable to the political official or the public only because of the authority to remove that individual during his or her term. In the case of a true political appointee, the basis for removal can lie totally within the discretion of the appointing official or entity. Thus, if an entity is to be found to be an exempt political subdivision, then those individuals who manage it must *continue* during their term to be responsible to those who put them in office.

In the instant case, trustees serve a 4-year term and cannot be removed except for cause. Further, the power of removal is vested in the district court, not in the discretion of a single political official or in the general electorate. Thus, removal is not at will of the mayor or other city officials, but must be based on some incompetency or wrongdoing established in a judicial proceeding. The trustees cannot be removed simply because a political official or the general public disagrees with the actions they have taken or the decisions they have made. During their terms, as long as they act competently and do not act *ultra vires*, the trustees are not controlled in the exercise of their discretion.

My colleagues argue that the removal procedure in the instant case is similar to the procedure in *Hawkins*. In *Hawkins*, however, the commissioners were subject to the state's general ouster law, the removal procedure applicable to *all* public officials.¹² In the instant case, the removal procedure is merely specified in the general Oklahoma statute that provides for the creation of any trust "for the furtherance of public functions," and, unlike *Hawkins*, there is no evidence nor does anyone contend that the removal procedure set forth in the trust agreement is the same procedure applicable to public officials.¹³ My colleagues note that a removal action may be brought by "a trustee, beneficiary, or any person affected by the administration of the trust estate," citing 60 Okl. Stat. Ann. Sec. 175.23(C). This provision, however, applies to "any trust instrument." Since this removal mechanism is common to trusts generally under Oklahoma law, including indisputably

private entities, it provides no support for a finding of exempt political subdivision.

My colleagues rely on the fact that the Oklahoma statute under which the Trust is created provides for a limited power of eminent domain.¹⁴ It is unclear from the trust agreement whether the Trust possesses the ability to exercise even this limited power of eminent domain.¹⁵ Even assuming that the Trust had this limited power of eminent domain, the Trust could only exercise such a power over private property and pursuant to a statutory provision separate from the provision according eminent domain powers to state governmental bodies.¹⁶ In contrast, the commissioners in *Hawkins* had the power of eminent domain over both public and private agencies.¹⁷

Finally, in my view, the remaining factors cited by my colleagues do not support a finding of exempt political subdivision in the absence of accountability to political officials through appointment and removal procedures. To be sure, the trustees take the same oath

¹⁴ Sec. 176(I) provides that

[a]ny public trust created pursuant to the provisions of this section shall have the power to acquire lands by use of eminent domain in the same manner and according to the procedures provided for in Sections 51 through 65 of Title 66 of the Oklahoma Statutes.

The Oklahoma statute referred to confers power upon railroads to take, hold, and appropriate real estate necessary for the location, construction, and convenient use of their road. *Guthrie & Western Ry. Co. v. Rhoades*, 73 P. 1134 (1903). Sec. 176(I) further provides that

[a]ny exercise of the power of eminent domain by a public trust pursuant to the provisions of this section shall be limited to the furtherance of public purpose projects involving revenue-producing utility projects of which the public trust retains ownership . . . Revenue-producing utility projects shall be limited to projects for the transportation, delivery, treatment, or furnishing of water for domestic purposes or for power, including but not limited to the construction of lakes, pipelines, and water treatment plants.

¹⁵ In an opinion addressing the issue of whether, under Oklahoma law, a public trust created under 60 Okla. Stat. Ann. Sec. 176 et seq. has the power of eminent domain for the purpose of acquiring lands for the construction of a water reservoir for municipal use, the Oklahoma Attorney General stated that a preliminary consideration is "whether the or not the public trust at issue herein is authorized by the instruments or articles prescribing its creation to engage in the contemplated activity." Okl. A.G. Opin. No. 78-260 (Nov. 21, 1978). In order to make this determination, "it would be necessary to review the Declaration of Trust creating a particular public trust, and proceed to make a factual determination as to whether or not the Declaration authorizes engagement in the contemplated activity." *Id.*

¹⁶ As noted above, whatever limited power of eminent domain the Trust may have is pursuant to a statutory provision according eminent domain to railroads.

¹⁷ "To carry out its functions, the District is granted not only all the powers of a private corporation, but also 'all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature.' This delegation includes the power of eminent domain, which the District may exercise even against other governmental entities." [Statutory citations omitted] 402 U.S. at 606.

¹⁰ 402 U.S. at 607-608.

¹¹ See *St. Jude Industrial Park Board v. NLRB*, 760 F.2d 223 (8th Cir. 1985); *NLRB v. Natchez Trace Electric Power Assn.*, 476 F.2d 1041 (5th Cir. 1973).

¹² 402 U.S. at 608.

¹³ The mere fact that the trust agreement can impose additional removal procedures establishes that it is not the same statutory procedure for removing public officials from office. See 60 Okl. Stat. Ann. Sec. 178(A), (C), and (E).

of office as elected officials, the Trust's operations are funded by public funds, the Trust's meetings are open to the public, and the Trust's records and minutes are available for public inspection. I do not dispute that the Trust has some characteristics of a public entity. If it did not, our inquiry would be at an end. I do not, however, find that the possession of a minimum of public attributes establishes the degree of accountability to elected public officials or the general electorate so as to remove the Trust from the jurisdiction of the Act.

Indeed, as is appropriate in a modern economy where the private sector is subject to regulation at both

the federal and state level, considerable public disclosure is mandated for and practiced by private corporations as well as the public sector. The existence of access that is available to the public is hardly dispositive of the question of whether an entity is a public subdivision within the meaning of the Act.

As discussed above, I find that the trustees here do not have the type of responsibility to either public officials or the general electorate that qualifies the Trust as an exempt political subdivision under Section 2(2) of the Act. Accordingly, I would process the petition.